In the Supreme Court

OF THE

United States

OCTOBER TERM, 1973

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

No. 72-700

HENRY HERNANDEZ, et al.,
Petitioners,

vs.

VETERANS ADMINISTRATION, et al.,
Respondents.

PETER MILLER, et al.,
Petitioners,

vs.

VETERANS ADMINISTRATION, et al.,
Respondents.

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The government contends in its brief that 38 U.S.C. § 211(a) bars judicial review of petitioners' claims, and that there are no constitutional impediments to thus denying petitioners all access to the courts. Further, it claims that petitioners substantive contentions are in any event so wholly frivolous that federal question jurisdiction is lacking. These arguments are untenable. They ignore (1) the plain meaning of § 211(a); (2) petitioners' right to a meaningful hearing; (3) the necessity for review by the judiciary on issues of constitutionality; and, (4) the merit of petitioners' substantive claims.

I

38 U.S.C. § 211(a) DOES NOT BAR THIS LAWSUIT.

The government argues that the language of 38 U.S.C. § 211(a) clearly forecloses judicial consideration of petitioners' constitutional claims, and further argues

that the 1970 amendment to § 211(a) clarified Congressional intent in this respect. (Gov. Brief, Johnson v. Robison, 72-1297 at 21-22, Gov. Brief, Hernandez at 8-9).

Both contentions are erroneous. First, the purpose of the 1970 amendment to § 211(a) was totally unrelated to the issue here; rather, it was intended to extend finality to decisions of the Administrator involving termination of benefits, thus overruling certain decisions of the Court of Appeals for the District of Columbia. See Pet. Openi Brief at 40-41. Indeed, the entire legislative history of § 211(a) contains no indication that Congress ever intended to preclude constitutional challenges to statutes under which the Veterans Administration operates.

Second, contrary to the government's assertion, § 211(a) by the terms of its language does not extend to the present lawsuit. The Administrator has not nor could he render a decision on the constitutional

questions raised; nor does the question of law to be resolved arise under a law administered by the Veterans Administration.[1/]

II

DUE PROCESS REQUIRES THAT PETITIONERS RECEIVE A MEANINGFUL HEARING.

The government contends that application of § 211(a) to this lawsuit does not violate the due process right to a hearing for two reasons: first, due process only requires a hearing where there are disputed questions of fact, and here there were no disputed factual issues; and second, under Board of Regents v. Roth, 408 U.S. 564 (1973), petitioners' claim for benefits is not entitled to due process protection.

1/ The district court judge who rendered the decision below in this case has recently construed § 211(a) as not constituting a bar to lawsuits challenging the constitutionality of Veterans Administration statutes. Greene v. Board of Veterans Appeals, ____ F.Supp. ____ (N.D.Calif., April 4, 1973).

The government's first contention is totally without merit. Under the due process clause, petitioners are entitled to a hearing appropriate to the nature of their claim. Boddie v. Connecticut, 401 U.S. 371 (1971); Armstrong v. Manzo, 380 U.S. 545 (1965). Petitioners' claim for veterans' educational benefits rests upon undisputed facts; therefore, a meaningful hearing must be one that resolves the questions of law presented. Since petitioners have had no hearing whatsoever on their constitutional claims, they have been denied a meaningful hearing.

The government's Roth argument is also defective. In the government's view, petitioners cannot claim a property interest, as defined in Board of Regents v. Roth, supra, and Perry v. Sindermann, 408 U.S. 593 (1972), because the statute granting benefits clearly excludes them by its terms and they thus had "no reasonable expectation"

of receiving educational benefits. (Gov. Brief at p. 17). Under that approach, no individual who claims that a statute on its face unconstitutionally denies him benefits would be entitled to the procedural protections of the due process clause. Thus, if a statute denied benefits based solely upon race or sex, the claimant discriminated against would not be entitled to a hearing on his claim because he has no "reasonable expectation" of receiving the benefits. Indeed, the more clearly unconstitutional the statute, the less the individual's right to a hearing.

To assert the government's position is to refute it. Certainly, the rationale of Roth and Sindermann encompasses a situation where an individual's claim for entitlement to benefits under a federal statute is based upon the grounds that the statute unconstitutionally excludes him from its terms. Petitioners' claim for benefits does not stem

solely from the Constitution; rather, petitioners contend that a federal statute creating property interests is subject to constitutional limitations (Sindermann, supra, at 597). The interplay of the statutes and these constitutional limitations provide the basis for the "legitimate claim of entitlement" which calls into play due process guarantees. Perry v. Sindermann, supra, at 601.2/

III

CONGRESS MAY NOT FORECLOSE ALL JUDICIAL REVIEW HERE.

The government in its brief has not dealt with a fundamental question at issue here: may Congress enact an allegedly unconstitutional statute and then bar the judiciary from determining its constitutionality. It

2/ If further proof is necessary that petitioners do have a legitimate claim of entitlement and a reasonable expectation of receiving the benefits which they seek, one need look no further than the decision of the District Court in the companion case of Johnson v. Robison, 72-1297, 352 F.Supp. 848 (D.Mass., 1973).

requires no elaborate discussion to recognize that Congress may not thus subvert any constitutional principle it happens to find objectionable, and that any individual aggrieved by an unconstitutional statute can seek a remedy in the courts.

In addition to this basic failure, several of the government's arguments are otherwise flawed. First, despite the government's assertion to the contrary (Gov. Brief 10) petitioners do not rest their case on the proposition that Congress must grant the federal courts all of the powers enumerated in Article III of the Constitution.3/

3/ Petitioners do submit, however, that Congressional control over the jurisdiction of this Court, at least, is circumscribed by Article III of the Constitution. Palmore v. U.S., ___U.S.___, 93 S.Ct. 1670 (1973). Thus, the government's interpretation of § 211(a) does run afoul of Article III. Sheldon v. Sill, 49 U.S. (8 How.) 441 (1850); and White v. Fenner, 29 F.Cas. #17,547 (C.C. R.I. 1818), cited by the government, are not to the contrary: each of those cases merely affirms the power of Congress to restrict the jurisdiction of courts of its own creation, a power which petitioners concede.

Instead, petitioners rely on a principle at once more narrow in application but more fundamental in origin: some court, somewhere must have the power to review the constitutionality of an Act of Congress. Marbury v. Madison, 5 U.S. 37 (1 Cranch 87)(1803).

Second, the government suggests that § 211(a) indicates Congressional intent to invoke sovereign immunity to bar review of the constitutionality of Veterans Administration statutes. The short answer is that sovereign immunity does not apply, since there is no evidence of Congressional intent to use § 211(a) to withdraw the sovereign's consent to suit. See Lynch v. United States, 292 U.S. 571, 583 (1934). More generally, however, there is simply no substance to the argument that Congress may use immunity from suit to abrogate the Constitution.

The government relies on the footnoted assertion in Larson v. Domestic and Foreign Corp., 337 U.S. 682, 691, n. 11 (1949), that

"a suit [based on the Constitution] may fail . . . if the relief . . . will require affirmative action by the sovereign or the disposition of unquestionably sovereign property". (Gov. Brief 12-13). In analysing that footnote, Professor Jaffe has observed:

> "If [Mr. Chief Justice] Vinson's may is read as may and not as must, it is unobjectionable . . . but if . . . [Larson] excludes an order to dispose 'of unquestionably sovereign property,' it would overrule a long line of Supreme Court decisions. There is nothing whatever in the opinion to indicate an intention to override such well-established doctrines, let alone any reason to do so." (citations omitted) L. Jaffe, Suits Against Governments and Officers: Sovereign Immunity, 77 HARV.L.REV. 1, 34 (1963).

Similarly in State of Washington v. Udall, 417 F.2d 1310, 1317-1319, (1969), the Court of Appeals for the Ninth Circuit gave extended consideration to this very issue and concluded:

> "We do not interpret the Larson Court's footnote 11 to mean that a suit must fail if the relief sought includes 'affirmative action by the sovereign or the disposition of unquestionably sovereign property.'" Id. at 1317.

West Coast Exploration Co. v. McKay, 213 F.2d 582, 596 (D.C.Cir., 1954), the only other case to focus on the intended meaning of the Larson footnote, reached the same conclusion:

> "[W]e think that the holding of the Larson case is as above-described in this opinion and that its ruling recognizing the two jurisdictional exceptions is not modified or lessened in force by the footnote referred to, and that it does not preclude the application of the exceptions to cases in which government property is involved."

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An earlier case containing language to the contrary was overruled.[4/]

Respondents' sovereign immunity claim is ultimately disingenuous, for it attempts to turn petitioners' prayer for affirmative relief - payment to them of educational benefits - into a jurisdictional bar. That view not only misdirects the Court's attention to a non-jurisdictional issue, but also is flatly inconsistent with this Court's recognition that the protection of constitutional

4/ The McKay decision continues along lines very similar to those argued here:

"[T]he contention that the Larson case rules . . . is an extreme contention indeed . . . . Under such a ruling the locator of a mining claim . . . could be arbitrarily denied a patent and there would be no recourse in the courts. Such a denial of recourse to the courts would be abhorrent to the justice according to law contemplated by the Constitution. The due process clause of the Fifth Amendment endows the United States courts with power, even though there is no statutory provision for direct review of the action of a public officer, to protect against arbitrary action by such an officer. No such meaning of the Larson case as is contended for can, in our view, be attributed to the Supreme Court." Id. at 596.

rights requires the availability of effective remedies for their violation. Bivens v. Six Unknown Agents, 403 U.S. 388 (1971).

IV

PETITIONERS' SUBSTANTIVE CLAIMS ARE MERITORIOUS

Finally, the government asserts that petitioners' substantive contentions do not present a substantial federal question, so that the decision to dismiss petitioners' complaints for lack of subject matter jurisdiction was correct.[5/] This theory, however, is wholly untenable in light of the decision of the District Court in Johnson v. Robison, 72-1297, supra, granting summary judgment to plaintiffs in an identical action. As this Court observed

5/ The government incorrectly suggests that the courts below ruled on the merits of this action (Gov. Brief 10, n.9). In fact, the court below considered the merits only for the purpose of determining that petitioners' claims were so wholly lacking in merit that there was no federal question jurisdiction. Since petitioners had correctly sought a three judge court under 28 U.S.C. § 2282, the courts below lacked power to reach the merits.

only last term, the test for determining when a claim raises a substantial federal question is whether that claim is "inescapably frivolous". Goosby v. Osser, 409 U.S. 512, 518 (1973). Given the opinion in Robison, the claims presented here are far from frivolous. Moreover, each of petitioners' substantive claims is fully supported by decisions of this Court. Indeed, petitioners strongly contend that, as the able Brief for the Appellees in Johnson v. Robison, 72-1297, convincingly demonstrates, the lower court decision in Robison in favor of plaintiffs accurately states the law and should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL

SUPREME COURT OF THE)
)
UNITED STATES)

The undersigned, a member of the Bar of the Supreme Court of the United States, hereby certifies that a copy of the foregoing Reply Brief of Petitioners was mailed today to the following attorneys as counsel for respondents:

Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Dated: November 30, 1973.

Richard L. Goff

HERNANDEZ ET AL. v. VETERANS' ADMINISTRATION ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-700. Argued December 11, 1973—Decided March 4, 1974

Petitioners, who were denied educational benefits under the Veterans' Readjustment Benefits Act of 1966 because, as conscientious objectors exempt from the military service who performed alternative civilian service, they were ineligible for such benefits, brought actions challenging the constitutionality, on First and Fifth Amendment grounds, of the provisions of the Act making them ineligible. The District Court dismissed the actions on the grounds that jurisdiction was barred by 38 U. S. C. § 211 (a) and petitioners' constitutional claims were insubstantial and without merit. The Court of Appeals affirmed on the basis of the jurisdictional bar. *Held:* Section 211 (a) does not bar judicial consideration of constitutional challenges to veterans' benefits legislation. *Johnson* v. *Robison*, *ante*, p. 361. P. 393.

467 F. 2d 479, vacated and remanded.

BRENNAN, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, MARSHALL, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. DOUGLAS, J., concurs in the result.

Jack R. Petranker, pro hac vice, and *Lawrence L. Curtice* argued the cause for petitioners. With them on the briefs were *Stephen V. Bomse* and *Charles C. Marson*.

Gerald P. Norton argued the cause for respondents. On the brief were *Solicitor General Bork, Acting Assistant Attorney General Jaffe, Harriet S. Shapiro, Morton Hollander*, and *William Kanter*.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioners, like the appellee and his class in *Johnson* v. *Robison*, *ante*, p. 361, are Class I–O conscientious ob-

jectors who, upon completion of alternative civilian service pursuant to § 6 (j) of the Military Selective Service Act, 50 U. S. C. App. § 456 (j), and the governing regulations of the Selective Service System, 32 CFR, Part 1660, applied for educational benefits provided by the Veterans' Readjustment Benefits Act of 1966. The Veterans' Administration denied petitioners' application for the reasons upon which appellee Robison's request was denied, *i. e.*, because a Class I–O conscientious objector who has performed alternative civilian service does not qualify under 38 U. S. C. § 1652 (a)(1) as a "veteran who . . . served on active duty" (defined in 38 U. S. C. § 101 (21) as "full-time duty in the Armed Forces"), and is therefore not an "eligible veteran" entitled under 38 U. S. C. § 1661 (a) to veterans' educational benefits provided by the Veterans' Readjustment Benefits Act of 1966.

Alleging that those sections of the 1966 Act discriminate against conscientious objectors in violation of the Fifth Amendment, and infringe the Religion Clauses of the First Amendment, petitioners filed two actions seeking declaratory, injunctive, and mandamus relief and requesting the convening of a three-judge district court. The District Court consolidated the two cases and granted the Government's motion to dismiss on the grounds that "plaintiffs' requests for affirmative relief are not within the jurisdiction of this Court due to the mandate of 38 U. S. C. § 211 (a) . . . [and] the plaintiffs' challenge . . . based on alleged violations of the Fifth and First Amendments to the United States Constitution are [*sic*] insubstantial and without merit." 339 F. Supp. 913, 916 (1972). Notwithstanding the District Court's dismissal of petitioners' *constitutional* claims on the ground of insubstantiality, the Court of Appeals, as we read that court's opinion, construed the order of dismissal as based solely upon the jurisdictional bar of § 211 (a), and af-

firmed the District Court on that ground. 467 F. 2d 479 (1972). We granted certiorari and set the case for oral argument with *Johnson* v. *Robison*, *ante*, p. 361. 411 U. S. 981 (1973).

We have held today in *Johnson* v. *Robison* that § 211 (a) does not bar judicial consideration of constitutional challenges to veterans' benefits legislation. Accordingly, the judgment of the Court of Appeals is vacated and the case remanded for further proceedings consistent with our opinion in *Johnson* v. *Robison*.

It is so ordered.

MR. JUSTICE DOUGLAS concurs in the result for the reasons stated in his dissenting opinion in *Johnson* v. *Robison*, *ante*, p. 386.